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No. 88-1729

In The

Supreme Court of the United States

October Term, 1988

GEORGE RODRIGUEZ,

Petitioner,

v.

DANT OF ARIZONA, an Arizona corporation, RUDY LOPEZ and JUDY LOPEZ,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Dant of Arizona and Rudy and Judy Lopez hereby ask the Court to deny the Petition for a Writ of Certiorari to review the judgment of the Arizona court of appeals. The trial court and the Arizona court of appeals have correctly decided the issues based on the law and the facts of this case; the Arizona supreme court has denied George Rodriguez' Petition for Review of the appellate court decision.

OPINIONS BELOW

On March 29, 1984, respondent Dant of Arizona filed its complaint against George and Maria Macias Rodriguez. Dant was granted a default judgment on its complaint on January 29, 1985. (App. A). On April 30, 1987, Rodriguez filed a Motion to Declare Judgment Void. Following a formal evidentiary hearing, the trial court denied the Rodriguez motion, expressly finding that Dant of Arizona exercised due diligence in attempting to locate Rodriguez prior to resorting to service by publication. (App. B). The trial court subsequently considered and denied the Rodriguez Motion for New Trial. (App. C). The Arizona court of appeals affirmed the trial court decision on December 15, 1988. (App. A to petition). The Arizona supreme court denied the Rodriguez Petition for Review on March 1, 1989. (App. B to petition).

RELEVANT STATUTORY PROVISIONS

16 A.R.S. Rules Civ. Proc., rule 4(e), at Appendix D.

RESPONDENTS' STATEMENT OF THE CASE

George and Maria Macias Rodriguez, (hereinafter "Rodriguez") acquired title to a lot in Glendale, Arizona in 1952. They lived on the property until 1960, in a house which was later condemned and torn down.

In 1968 Maria Macias died and George Rodriguez married his present wife, Luz Marina. Also in 1968, George Rodriguez moved from Glendale, Arizona to

Wasco, California. In 1976, George Rodriguez moved from 1026 Broadway to 2234 Third Street, in Wasco. Until 1987, the records of the Maricopa County Treasurer and the Maricopa County Assessor listed the Rodriguez address as 1026 Broadway, Wasco, California.

Beginning in 1977, Rodriguez defaulted on the tax payments for the vacant lot in Glendale, Arizona. On February 23, 1981, Dant of Arizona (hereinafter "Dant") purchased a Certificate of Purchase for the lot. In 1984, Dant filed legal proceedings to obtain a Treasurer's Deed for the subject lot and to foreclose the Rodriguez interest in the property.

To serve its complaint and summons on Rodriguez, Dant through its attorney, Robin Allen, searched the public records and other sources and eventually located the Third Street address. Dant attempted personal service of its complaint on Rodriguez at that address, however, the deputy sheriff was told by a woman answering the door that Rodriguez had moved. The sheriff notified Dant by affidavit that service had not been accomplished, "Moved. Forwarding address unknown." Unable to personally serve Rodriguez, and after further checks of public records, Dant served notice by publication in June of 1984.

A default hearing was held on January 29, 1985. In that hearing Allen testified to his inability to locate Rodriguez, including the attempted service at the Third Street address by the sheriff. The court entered default judgment for Dant on or about January 29, 1985, finding that Rodriguez was served in the manner and time required by law but had made no appearance. (App. A).

The court ordered title to the subject property to be conveyed to Dant, free and clear of all liens, taxes and claims. Dant paid back taxes on the property for the years 1977, 1978, 1979, 1980 and 1982.

On April 30, 1987, Rodriguez filed a Motion to Declare Judgment Void. Rudy R. and Judy Lopez, bona fide purchasers of the property from Dant, were permitted to intervene in the action. Following a formal evidentiary hearing, which included testimony from George Rodriguez and his present wife, the trial court denied the Rodriguez Motion to Declare Judgment Void. The court found Dant had exercised due diligence in attempting to locate Rodriguez before resorting to service by publication. (App. B).

The trial court subsequently denied a Rodriguez Motion for New Trial. (App. C). The Arizona court of appeals upheld the lower court decision, finding that Dant exercised due diligence in attempting to locate George Rodriguez prior to resorting to service by publication. (App. A to petition). The Arizona supreme court refused to grant Rodriguez' Petition for Review. (App. B to petition).

ARGUMENT

The "Question Presented for Review" of petitioner George Rodriguez is misleading to the court. Rodriguez frames his issue as follows:

> 1. WHETHER SERVICE BY PUBLICATION IS INEFFECTIVE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHERE NOTIFICATION BY MAIL TO A LAST KNOWN ADDRESS IS NOT ATTEMPTED AND IN FACT PLAINTIFF HAS IN ITS POSSESSION A VALID CURRENT ADDRESS AND THE COUNTY RECORDS REVEAL A FORMER ADDRESS AT WHICH DEFENDANT WOULD HAVE RECEIVED CORRESPONDENCE.

The "issue" thus framed ignores pertinent, material facts that were considered by the Arizona courts in reaching a decision in this case. For example, Dant attempted personal service on Rodriguez, but the process server was told at the door of the "last known address" that Rodriguez had moved and there was no known forwarding address. Dant had no way of knowing that it had in its possession a valid current address when the occupant of the house informed the deputy sheriff that Rodriguez had moved.

Furthermore, the Rodriguez address in the Maricopa County assessor records, at which Rodriguez now claims he would have received correspondence, was a house he had moved from eight years earlier. No evidence was presented to the trial court, other than pure speculation, that Rodriguez would have actually received a registered letter sent to him at the old Broadway address. Moreover, service on Maria Macias Rodriguez was absolutely impossible because she had died in 1968.

Respondents are in agreement with the due process cases cited by petitioner, however, as the Arizona courts recognized, application of the principles of due process to the facts of this case show that the due process rights of Rodriguez were not violated by the default judgment granted in January 1985.

In Arizona, service of process on an out-of-state defendant is governed by Ariz. R. Civ. P. 4(e)(2) which provides that service may be made either by registered mail or direct service. Where the defendant is a non-resident of the state whose address is unknown, service of process may be by publication, pursuant to Ariz. R. Civ. P. 4(e)(1) and 4(e)(3). The Arizona courts have consistently held that a finding of "due diligence" prior to service by publication is a jurisdictional requirement. *Preston v. Denkins*, 94 Ariz. 214, 220, 382 P.2d 686, 691 (1963); *Omega II Investment Co. v. McLeod*, 153 Ariz. 341, 736 P.2d 824 (Ct. App. 1987). Where the location of record owners of property is readily available, the courts have uniformly held that the trial court lacked jurisdiction where service was by publication. *Id.* at 342, 736 P.2d at 825.

Where the address or whereabouts of the person interested in the proceeding can be discovered by obvious and simple means, service by publication is invalid. *Mervyn's, Inc. v. Superior Court*, 144 Ariz. 297, 300, 697 P.2d 690, 693, n. 4. (1985). Arizona is in accord with decisions of the United States Supreme Court holding that notice by publication is insufficient with respect to a person whose name and address are known or easily ascertainable. *See e.g., Schroeder v. New York City*, 371 U.S.

208, 83 S. Ct. 279 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950).

Pursuant to law, Dant attempted the type of service most likely to provide actual notice, personal service. Dant's efforts to locate Rodriguez were actually successful but the process server was told that Rodriguez no longer lived at that address. Lacking a valid address, Dant served notice by publication as permitted by Ariz. R. Civ. P. 4(e).

The trial and appellate courts found Dant exercised due diligence in attempting to locate Rodriguez prior to service by publication where Dant's efforts were as follows:

1. Attorney Robin Allen searched the records at the Maricopa County treasurer's office and the Maricopa County assessor's office. He located the Broadway address in Wasco, California;

2. He contacted the information operator in Wasco to verify that Rodriguez was living at the Broadway address. The operator told Allen that Rodriguez was at 2234 Third Street, in Wasco.

3. He sent the summons and complaint to the Kern County sheriff, requesting personal service at the Third Street address;

4. He was notified by affidavit of deputy sheriff Sgt. Chris Hill that Hill was unable to serve Rodriguez at 2234 Third Street or anywhere within the judicial district, because they had moved, "forwarding address unknown."

5. He then checked local telephone books and the records of the Motor Vehicle Department in Maricopa County, to determine if Rodriguez had returned to Arizona.

6. Unsuccessful in locating Rodriguez, he served notice of the complaint by publication in *The Record Reporter*.

The Kern County deputy sheriff, Sgt. Chris Hill, who attempted service on Rodriguez at the Third Street address, testified at his deposition that the woman answering the door informed him Rodriguez had moved and left no forwarding address. Although petitioner raises a question in his brief about whether there could have been some confusion between George Rodriguez and his son George, the current Mrs. Rodriguez testified to the contrary at the evidentiary hearing. Mrs. Rodriguez said she was the only person who would have answered the door, and she would not have been confused about whether the person at the door was asking for the father or son.

No one knows for sure why personal service was not possible on Rodriguez, but a likely explanation is that Rodriguez was avoiding the service he now complains he did not get. Rodriguez argues that service by registered mail should have been attempted after the failed attempt at personal service. He ignores the fact that Dant did not have a known address after it was informed that Rodriguez had moved from Third Street. Furthermore, a letter sent by registered mail requires the signature of the addressee. If the addressee is not home, he is notified to go to the post office to pick up his mail. If that does not occur, and a second delivery attempt is unsuccessful, the letter is returned as undelivered.

Whether or not Rodriguez would have picked up his registered letter or continued to avoid service is pure speculation. Mailing an un-registered letter to Rodriguez would not have complied with the requirements of Ariz. R. Civ. P. 4(e)(2), and would have left Dant open to claims that it had never effected service on Rodriguez.

Petitioner's argument that the summons and complaint should have been mailed to the old Broadway address because the tenant there would have given it to him, is similarly flawed. George Rodriguez had not lived at that address for eight years. Mailing the papers to the old address would have indisputably failed to comply with Ariz. R. Civ. P. 4(e)(2). Moreover, petitioner offers the court only speculation, not evidence, in his claim that George Rodriguez would have been notified of the mail by a tenant.

The Arizona court of appeals, in reviewing the facts and issues of this case, stated there is no formula or checklist that constitutes due diligence, and Dant "was not required to do 'extensive detective work into the whereabouts of strangers.' " The court concluded as follows:

> We conclude that Dant exercised due diligence in attempting direct service: Allen found Rodriguez's Third Street address by reviewing telephone directories, Department of Motor Vehicle records, and County Treasurer's and Assessor's records and by speaking to a telephone operator in Wasco, California; and Allen attempted direct service at that address.

(Arizona Court of Appeals Memorandum Decision, petitioner's App. A-10).

CONCLUSION

The Petition for Writ of Certiorari to review the judgment of the Arizona court of appeals should be denied. The court of appeals, in affirming the trial court decision, correctly held that the due process rights of petitioner Rodriguez were not violated where respondent exercised due diligence in attempting to locate Rodriguez before resorting to service by publication.

Respectfully Submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DANT OF ARIZONA, an Arizona partnership, Plaintiff, vs. GEORGE RODRIGUEZ, and MARIA MACIAS RODRIGUEZ, husband and wife; GLENN STAPLEY, Maricopa County Treasurer; JOHN DOES I-V and JANE DOES I-V; ABC CORPORATIONS; and THE UNKNOWN HEIRS OF ANY OF THE ABOVE NAMED DEFENDANTS, IF DECEASED, Defendants.	NO. C 510165 JUDGMENT

This cause having come on regularly for hearing on the 29th day of January, 1985, the plaintiff being represented by counsel, ROBIN W. ALLEN, and the defendants neither being present personally, nor represented by counsel, and the Court having received the sworn testimony of counsel for the plaintiff, and evidence in support of the allegations of the Complaint herein,

IT APPEARING to the Court that the above named defendants were served in the manner and for the time required by law, and that GEORGE RODRIGUEZ and MARIA MACIAS RODRIGUEZ have made no appearance herein and the default of said defendants having been regularly and duly entered and the plaintiff having

presented evidence in support of the allegations of the Complaint,

IT IS THE FINDING OF THE COURT that the material allegations of the plaintiff's Complaint are true, and the relief prayed for by plaintiff should be granted, and

THE COURT FURTHER FINDS that on or about the 23rd day of February, 1981, the following described parcel of real property located in Maricopa County, Arizona, to wit:

> Lot 18, LA CASITA MIA, according to the plat of record in the office of the Maricopa County Recorder in Book 47 of Maps, page 21.

was legally and regularly sold by the Maricopa County Treasurer for delinquent taxes, which had been levied and assessed against said parcel of real property, and Certificate of Purchase No. 79004184 on parcel number 146-7-18 being regularly and legally issued therefor; that by regular and lawful sale and assignment, and for due consideration, the plaintiff became the owner of all right, title and interest of the County of Maricopa, State of Arizona, in and to said parcel of real property; that said parcel of real property has not been redeemed, nor has tender of money been made for said redemption; and that a period of more than three (3) years has elapsed since the described real property was sold for delinquent taxes.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendants, GEORGE RODRIGUEZ and MARIA MACIAS RODRIGUEZ, as follows:

1. That, pursuant to A.R.S., Section 42-452, a Treasurer's Deed be executed to the plaintiff as holder and

purchaser of Maricopa County Treasurer's Certificate of Purchase on the aforementioned and described real property, conveying to plaintiff said real property, free and clear of all liens, taxes and claims, except any unpaid real property taxes duly assessed and which may still be owing.

2. That the defendants above referenced, and all of them, and all persons claiming any interest in the aforementioned real property subsequent to the time Lis Pendens Notice was filed with the said Maricopa County Recorder, be and they are hereby forever foreclosed of all right, title, interest and equity of redemption in and to the foregoing premises, and that plaintiff is the owner of the said real property in fee simple, free and clear of all claims and liens, except taxes duly assessed as set forth above and any public easements and rights of way.

3. The Court expressly finds and determines that there is no just reason for delay in entering final judgment and expressly directs that this judgment be entered forthwith.

DONE IN OPEN COURT this date: *January 29, 1985.*

/s/ William Topf
Superior Court Commissioner

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DANT OF ARIZONA, Plaintiff, vs. GEORGE RODRIGUEZ, et ux., et al., Defendant.	)	NO. C-510165 ORDER

This matter having come on regularly for evidentiary hearing on August 7, 1987, on defendants Rodriguez' Motion to Declare Judgement Void. Plaintiff represented by counsel, Robin W. Allen. Defendants Rogriguez are present with counsel, Atmore Baggot and Spanish interpreter, Luz Fuenzalida. Intervenors Rudy R. Lopez and Judy C. Lopez are not present, but are represented by counsel, Marigene Dessaint.

Defendants George Rodriguez and Luz Marina Rodriguez are sworn and both testify. Exhibits 1 through 31 were all marked and received into evidence, including the deposition of Kern County Deputy Sheriff, Chris Edward Hill, dated July 6, 1987, and the deposition of Robin W. Allen, dated June 3, 1987. Closing arguments were presented by all counsel of the parties and intervenors. The matter was taken under advisement.

This matter has been under advisement. The Court has considered all memoranda submitted, all evidence

presented at the evidentiary hearing, and the arguments of Counsel.

THE COURT FINDS and ORDERS as follows:

1. On January 29, 1985, judgment was entered against Defendants Rodriguez based on service by publication. At the default hearing on that date, Commissioner Topf entered default judgement after hearing evidence of Plaintiff's efforts to use due dilligence and to locate Plaintiffs for personal service.

2. Plaintiff's counsel attempted to locate Defendants Rodriguez by reviewing records of Maricopa County Treasurer's and Assessor's Offices. Counsel hired the Kern County, California's Sheriff's Office to serve Defendants personally with a Summons and Complaint. The Sheriff's Office attempted to serve Defendants at 2234 Third Street, Wasco, California, or anywhere within the Judicial District. Plaintiff's Counsel was notified that the attempted service was unsuccessful and the Summons and complaint were returned with the indication that Defendants Rodriguez had moved, their forwarding address unknown. Plaintiff's attorney then checked the Motor Vehicle Department records in Maricopa County and local phone directories unsuccessfully.

3. The Court finds that Plaintiff's Counsel's efforts to locate Defendants Rodriguez were reasonable and all support a finding that due dilligence was exercised in attempting to locate Defendants Rodriguez before serving them by publication.

THEREFORE, IT IS ORDERED denying Defendants Rodriguez' Motion to Declare Judgement Void.

DONE IN OPEN COURT, this date: *October 29, 1987* .

/s/ Ruth H. Hilliard
Ruth H. Hilliard
Superior Court Judge

Copy of the foregoing mailed
this date 10/7/87 to:

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By /s/ RWL

APPENDIX C

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

CC13-44310
Code

11-9-87
Date

HON. RUTH H. HILLIARD
Judge or commissioner

P. Cook
Deputy

No. *C 510165*

DANT OF ARIZONA

v.

GEORGE RODRIGUEZ, et ux.; et al.

Robin W. Allen
(Mesa)

Atmore Baggot

Marigene Dessaint

County Attorney
By: Rodrick D. MacMillan

The Court has considered Defendants Rodriguez' Motion for New Trial, as well as the Responses filed.

THE COURT FINDS that Plaintiff exercised due diligence and that Rule 4(c)(3), A.R.C.P., was not violated in light of all the efforts made by Plaintiff's Counsel.

IT IS ORDERED denying Defendants Rodriguez' Motion for New Trial.

APPENDIX D

16 A.R.S., Ariz. R. Civ. P., rule 4(e):

4(e)(1) Summons; Alternative Methods of Service. When a defendant is a non-resident of the state, or is absent from the state, or is a transient person, or is one whose residence is unknown to the party, or is a corporation incorporated under the laws of any other state or foreign country which has no legally appointed and constituted agent in this state, or is attempting to avoid service of summons, a summons shall be issued as in other cases and service may be made in accordance with Sections 4(e)(2) or 4(e)(3) of this Rule. The methods of service herein provided shall be applicable for the assertion of any claim by way of a cross-claim, third party claim or other appropriate pleading against any party who has not appeared in the action and shall be in addition to and not exclusive of any other means of service which may be provided by statute or rule.

(2) Summons; Personal Service Out of State. When the defendant is a resident of this state, or is a corporation doing business in this state, or is a person, partnership, corporation or unincorporated association subject to suit in a common name which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state. In case of a corporation or partnership or unincorporated association, service

under this Rule shall be made on one of the persons specified in Section 4(d)(6).

(a) Registered Mail. When the whereabouts of a defendant outside the state is known, the serving party may deposit a copy of the summons and complaint in the post office, registering it with a return receipt requested. Upon return through the post office of the registry receipt, the serving party shall file an affidavit with the court showing the circumstances warranting the utilization of the procedure authorized under Section 4(e)(1); and (a) that a copy of the summons and complaint was dispatched to the party being served; (b) that it was in fact received by the party as evidenced by the attached registry receipt; (c) that the genuine receipt thereof is attached; and (d) the date of the return thereof to the sender. This affidavit shall be prima facia evidence of personal service of the summons and complaint and service shall be deemed complete and time shall begin to run for the purposes of Section 4(e)(4) of this Rule thirty (30) days after the filing of the affidavit and receipt.

(b) Direct service. Service out of the state may also be made in the same manner provided in Section 4(d) of this Rule by a person authorized to serve process under the law of the state where such service is made. Service shall be complete when made and time for purposes of Rule 4(e)(4) shall begin to run at that time, provided that before any default may be had on such service, there shall be filed an affidavit of service showing the circumstances warranting the utilization of the procedure under Section 4(e)(1) and

attaching an affidavit of the process server showing the fact of the service.

(3) Summons; Service by Publication. Where by law personal service is not required, and a person is subject to service under Section 4(e)(1), such Service may be made by either of the methods set forth in Section 4(e)(2) or by publication. Service by publication shall be made by publication of the summons in a newspaper published in the county where the action is pending, and if no newspaper is published in such county, then in a newspaper published in an adjoining county, at least once a week for four successive weeks and the service shall be complete thirty days after the first publication. When the residence of the defendant is known, the party shall on or before the date of the first publication mail a copy of the summons and complaint, postage prepaid, directed to the defendant at the defendant's place of abode. The plaintiff shall file an affidavit showing the publication and mailing and the circumstances warranting the utilization of the procedure under Section 4(e)(1) which shall be prima facie evidence of compliance herewith, and if the residence is unknown, the affidavit shall so state.

* * *